

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SWEET STREET DESSERTS, INC.,

Plaintiff,

v.

CHUDLEIGH'S LTD.,

Defendant.

Civil Action No. 5:12-CV-3363-MMB

**SWEET STREET'S ADDITIONAL
STATEMENT OF UNDISPUTED FACTS
IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT AND IN
OPPOSITION TO CHUDLEIGH'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

At the request of defendant, Chudleigh's Ltd. ("Chudleigh's"), plaintiff, Sweet Street Desserts, Inc. ("Sweet Street") hereby submits its additional Statement of Undisputed Facts in support of its motion for summary judgment and in opposition to Chudleigh's motion for partial summary judgment. The foregoing factual statements are all already contained in Sweet Street's Responses to Chudleigh's Ltd. Statement of Undisputed Facts, served on Chudleigh's on July 25, 2014, and have been modified therefrom for context and comprehension only for purposes of allowing Chudleigh's to respond directly thereto. The numbering is continued from Sweet Street's Statement of Undisputed Facts in Support of its Motion for Summary Judgment.

224. According to the Canadian Intellectual Property Office, industrial design Registration No. 84125 is now in the "Public Domain." (Appendix 94, Canadian Intellectual Property Office Status Search Results for Reg. No. 84125.)

225. The packaging used for sale of the hand-folded Blossom product to the food service industry does not contain any markings providing notice of Chudleigh's claimed trademark rights in the configuration of the product. (Appendix 77, Chudleigh 30(b) Dep. at 140:9-145:4; Appendix 95, CHL319; Appendix 96, CHL823.)

226. As of September 2013, Chudleigh's website did not contain any notice or marking indicating that the shape of the Blossom configuration was a protected trademark. (Appendix 63, Chudleigh's Website.)

227. Scott Chudleigh and Dean Chudleigh testified that mechanics from Chudleigh's communicate with Form & Frys about replacement parts. (Appendix 97, Dean Chudleigh Dep. at 38:13-39:2.)

228. Sweet Street's expert, Dr. Jacob Jacoby, ultimately agreed that for the purposes of Dr. Jerry Wind's report on likelihood of confusion that the intermediaries' (distributors') states of mind were the most relevant to be studied in the Wind survey. (Compare Jacoby Report (Chudleigh Ex. 17, p.8), with Appendix 98, Jacob Jacoby Dep. at 16:9-15).

229. George Goldberg testified that he "visited with at least 30 brokers on Chudleigh's behalf," but when pressed for the names of the 30 brokers, Goldberg could only name four. (Appendix 99, Goldberg Dep. at 164:10-22.)

230. At the time that Sweet Street sent its samples to Applebee's for review and approval in July 2010, the principal of Sweet Street did not even know that Chudleigh's or Chudleigh's Blossom products existed. (Appendix 102, Sandy Solmon Dep. at 41:20 – 42:5.)

231. When Sweet Street was considering purchasing automated folding equipment from Form & Frys and had been sent a quote for the purchase of such equipment by Rondo, Inc., the Rondo dealer, David Kollar, sent Sweet Street a video showing the operation of the Form &

Frys folding equipment on March 18, 2011, so Sweet Street could evaluate it while they deliberated whether to accept the Rondo quote and submit a purchase order. (Appendix 103, SSD1750, 3-18-11 email from David Kollar of Rondo to Tim Brandi of Sweet Street attaching “Hercules Tulip folder.WMV” video.)

232. Scott Chudleigh testified that the only enforcements he could recall in the United States were against Crustie’s Bakery in 2001 (Appendix 100, Chudleigh 30(b)(6) Dep. at 327:10-20) and a “misunderstanding” with Disney ten years ago that led to the Disney bakery purchasing Chudleigh’s product (Appendix 101, Chudleigh 11-15-13 Individual Dep. at 189:18-193:10).

Respectfully submitted,

Dated: August 4, 2014

BAKER & HOSTETLER LLP



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